Supreme Court, U.S.
FILED
MAY 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1635

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

REVEREND CALVIN O. BUTTS, III and DIGNA SANCHEZ, on behalf of themselves and other similarly situated,

Petitioners,

-against-

CITY OF NEW YORK, NEW YORK CITY BOARD OF ELECTIONS, COMMISSIONERS MATTEO LUMETTA, FERDINAND C. MARCHI, ROSEMARY A. MILLUS, JOSEPH J. PREVITE, MARTIN RICHARDS, JAMES S. BASS, ALICE SACHS, ANTHONY SADOWSKI, BETTY DOLEN, Executive Director, ROBERT S. BLACK, President, and ORLANDO VELEZ, Secretary,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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May 23, 1986

QUESTION PRESENTED

Does New York Election Law §6-162, which requires that if no candidate for the offices of Mayor, City Council President, or Comptroller of the City of New York receives 40% or more of the votes cast in a party's general primary election, a run-off primary between the two top vote-getters shall be conducted, have the effect of denying to minority voters an equal opportunity to participate in the political process?

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STATEMENT OF THE CASE

Petitioners, consisting of a class of all present and/or potentially eligible black and

Hispanic voters in the City of New York,[1] commenced this action in October 1984, seeking injunctive and declaratory relief holding that New York Election Law §6-162 ("§6-162" or "run-off statute") violates Sections 1 and 2 of the Voting Rights Act (42 U.S.C. §§1971, 1973), the Civil Rights Act (42 U.S.C. §§1981, 1983), and the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution. On December 21, 1984, the Attorney General of the State of New York submitted a consent order dismissing the action as against the State and the Governor.[2] The remaining defendants in the

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[1]On February 11, 1985, the district court issued an order declaring this is a class action and requiring notice of pendency of this action to all class members.

[2]Although the State of New York did not appear as a party in the district court, it (Footnote Continued)

district court were the City of New York and its Board of Elections.

After a bench trial, Judge Brieant of the Southern District of New York, in a 73-page Memorandum and Order, dated August 13, 1985 (App. 39a-166a),[3] concluded that Election Law §6-162 violated the Fourteenth Amendment and Section 2 of the Voting Rights Act and granted petitioners the declaratory and injunctive relief they had requested.[4] In a Final Order dated August 16, 1985, the district court enjoined

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(Footnote Continued)
submitted an amicus brief in the Second Circuit urging reversal of the district court opinion.

[3]References are to pages of the Appendix submitted in support of the petition for a writ of certiorari.

[4]The district court also held that Election Law §6-162 did not deny petitioners their rights under the First or Thirteenth Amendments, and found it unnecessary to reach petitioners' Fifteenth Amendment claim (App. 133a, 161a).

respondents from conducting any run-off primary elections pursuant to §6-162. A Notice of Appeal was filed by respondents on August 16, 1985.

Due to the close proximity of the 1985 primary elections, respondents requested that the appeal be expedited, which request was granted by the Second Circuit. In a decision issued December 13, 1985, a panel of the Second Circuit (Oakes, dissenting) reversed the judgment of the district court, "[b]ecause the record shows that the primary run-off law was never intended to deny minority voters--and does not have the effect of denying them--an equal opportunity to participate in the political process...." (App. 6a.)

The Second Circuit concluded that the district court's finding that §6-162 was enacted with a discriminatory purpose was clearly erroneous (App. 12a, 17a);

accordingly, it reversed the district court's holding that the run-off law violates the Equal Protection Clause of the Fourteenth Amendment (App. 17a).[5] After reviewing the analysis adopted by Judge Brieant in addressing the issue of legislative intent, the Court concluded that "the district court minimized evidence probative of the legitimacy of the law, and as a result, drew all inferences against its constitutionality." (App. 15a.)

The Second Circuit likewise found to be improper the analysis adopted by the district court with respect to the Voting Rights Act claim. The Second Circuit held that the district court erred in its interpretation of what type of review is required under the

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[5]Petitioners do not challenge the holding that §6-162 does not violate the Equal Protection Clause. See Petition, p. 11, n.1.

"results test", which is incorporated in amended Section 2 of the Voting Rights Act. The Court found that the lower court had failed to focus on the basic issue presented under Section 2, i.e., whether the run-off statute denies to racial minorities fair and equal access to the political process (App. 17a-18a). Recognizing that in elections for single-member offices, such as those conducted in New York City for the offices of Mayor, City Council President, and Comptroller, the rule has always been that the candidate with the most votes wins (App. 19a-20a), the Court concluded that the run-off election requirement "does not deny any class an opportunity for equal representation and therefore cannot violate the Act." (App. 19a.) Additionally, the Court found especially persuasive the fact that the run-off statute "has not yet had any negative effect on a minority candidate;

indeed, it is not at all clear which way the law will cut - it may help a minority candidate to win nomination." (App. 21a) (emphasis in original). Accordingly, the Second Circuit reversed the judgment of the district court, with direction to dismiss the complaint (App. 25a).

REASONS FOR DENYING A WRIT OF CERTIORARI

In considering petitioners' claim under Section 2 of the Voting Rights Act, the Second Circuit conducted a proper analysis of Election Law §6-162, by focusing, as the district court failed to do, on the question of whether the law denies to racial minorities fair and equal access to the political process. In addition, the Second Circuit gave due consideration to the important distinctions between this case and other voting rights cases where run-off requirements have been challenged, since this is the first such case in which the requirement operates in the absence of some other voting practice or procedure which may deny minorities access to the political process or dilute their voting strength (App. 18a-19a). The Court correctly determined that this run-off law was not

intended to, and does not have the effect of, discriminating against minority voters.

Background of Election Law §6-162

The enactment of the run-off statute was prompted by the results of the 1969 election for Mayor of New York City (App. 6a). In that year, Mario Procaccino won the Democratic Party primary election with 33% of the votes cast and, as a result, became the Democratic Party's nominee in the general election. Mr. Procaccino's opponents in the primary were Herman Badillo, Robert Wagner, Norman Mailer, and James Scheuer. Procaccino, a relatively conservative candidate, had obtained a plurality vote in the primary when the party's mainstream vote split between Herman Badillo and Robert Wagner, who received 28% and 29% of the primary vote, respectively. In the general election, Mr. Procaccino's opponents were

John Marchi, the Republican Party nominee, and incumbent John Lindsay, who ran as an Independent and as the Liberal Party nominee. Mr. Lindsay won the general election with 42% of the votes cast.

In 1972, a bill was introduced in the New York State Legislature by Assemblymen Stanley Steingut and Albert Blumenthal which provided that in cities with a population of one million or more, when no candidate for the office of Mayor, City Council President, or Comptroller receives 40% or more of the votes cast in a primary election, the New York City Board of Elections shall hold a run-off primary between the two top vote-getters on the second Tuesday next succeeding the date on which the initial primary election was held.[6]

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[6]In 1976 and 1978, the run-off statute was
(Footnote Continued)

The few opponents to the run-off bill argued that it could have the effect of preventing blacks or Hispanics from being elected to the three city-wide offices. However, the proponents of the bill explained that the run-off requirement would serve the important purpose of insuring that party candidates truly represent the ideologies of a substantial plurality of the electorate. State Senator Robert Garcia, an Hispanic, who was at the time a leading supporter of Herman Badillo's planned mayoral candidacy in 1973, voted in favor of

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(Footnote Continued)
amended to provide, inter alia, that its terms were to apply to the City of New York, rather than cities with a population of one million or more. (Because no other city in New York State has a population of one million or more, the statute has never applied to any jurisdiction other than New York City.) In addition, the requirement that the run-off primary election be held on the second Tuesday after the date of the initial primary was deleted. See L.1976, c.233 §1; L.1978, c.373, §65.

the run-off bill, and stated in the legislative debate that Mr. Badillo, an Hispanic, had told him that he supported the law (App. 8a). The run-off bill passed in the State Assembly with virtually no opposition, all five black and Hispanic Assemblymen from New York City voting in favor of it (App. 8a). By votes of 49-8 in the State Senate and 104-5 in the Assembly, the run-off statute (then Election Law §131-a) became law in June, 1972 (L. 1972, c.877, §1).

In 1973, Mario Procaccino unsuccessfully challenged the newly-enacted run-off statute in New York Supreme Court. Procaccino v. Board of Elections, 73 Misc.2d 462, 341 N.Y.S.2d 810 (Sup. Ct. N.Y. Co. 1973). Mr. Procaccino's contentions that the run-off statute was unconstitutional as violative of, inter alia, the Fourteenth Amendment of the United States Constitution and the Home Rule provision of the New York State Constitution

(N.Y. Const., Art. IX, §2, subd.[b]) were rejected by the State Supreme Court. The Court found that since the statute related to a matter of State concern (i.e., the election process), the Home Rule provisions were not violated by the State's enactment of a run-off law which applied only to New York City. As to the challenges under the United States Constitution, the Supreme Court held that the run-off statute did not deprive Procaccino of any rights protected by the Fourteenth Amendment's Due Process Clause, since the law does not deprive any voter of the right to vote, or by the Equal Protection Clause, since the enactment "has a rational basis, to wit, the implementation of 'effective local self-government.' " 73 Misc.2d at 470, 341 N.Y.S.2d at 818-19.

The Actual Effects of Election Law §6-162

Since the enactment of the run-off statute in 1972, three run-off primary elections have been held in New York City. All three run-off elections were held in Democratic Party primaries; two were held for the office of Mayor (1973 and 1977), and one was held for the office of City Council President (1977).

In 1973, there were four candidates in the Democratic Party primary for Mayor--Mario Biaggi, Albert Blumenthal, Herman Badillo and Abraham Beame. The percentages of the total votes which each of the candidates obtained were as follows:

Abraham Beame	34.5%
Herman Badillo	29%
Mario Biaggi	20.5%
Albert Blumenthal	16%

A run-off election was held in which Mr. Badillo[7] and Mr. Beame received the following percentages of the total votes cast:

Abraham Beame	61%
Herman Badillo	39%

In 1977, there were seven candidates seeking the Democratic Party nomination for Mayor--Bella Abzug, Herman Badillo, Abraham Beame, Mario Cuomo, Joel Harnett, Edward Koch, and Percy Sutton.[8] The results of the initial primary election were as follows:

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[7]Herman Badillo is the only black or Hispanic candidate to have participated in a run-off election in New York. Mr. Badillo conceded, at trial, that he would not have obtained the Democratic Party nomination in 1973 even if there had been no run-off requirement.

[8]Prior to his 1977 bid for the mayoralty, Mr. Sutton, who is black, had served as Manhattan Borough President, being elected to that office on several occasions by substantial and overwhelming margins, by an electorate which was primarily white, while running against white candidates.

Edward Koch	20%
Mario Cuomo	19%
Abraham Beame	18%
Bella Abzug	16.5%
Percy Sutton	14%
Herman Badillo	11%
Joel Harnett	1.5%

Mr. Koch was the winner of the 1977 runoff primary which subsequently was held between himself and Mr. Cuomo, obtaining 55% of the total votes cast in that election.

The other run-off primary held in 1977 was in the Democratic Party primary for nomination for the office of City Council President. In the initial primary,[9] the results were as follows:

Paul O'Dwyer	31%
Carol Bellamy	25%
Carter Burden	20%
Abraham Hirschfeld	17%
Leonard Stavisky	7%

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[9]None of the five candidates in the 1977 primary for City Council President was black or Hispanic.

In the run-off election, Ms. Bellamy, "who seemed something of an 'outsider' at the time" (App. 22a), defeated incumbent Paul O'Dwyer, receiving 59% of the run-off vote.

As is apparent from an analysis of the history of the statute's operation, the run-off law has not operated to deprive any black or Hispanic candidate of election to an office to which he otherwise would have been elected. Rather, the actual effect of Election Law §6-162 has been: (1) to give a minority candidate (Herman Badillo) a second chance to obtain the Democratic Party nomination, in 1973; (2) to prevent a candidate receiving only 20% of the initial primary vote from automatically receiving the Democratic Party mayoral nomination, in 1977, during the depths of the City's fiscal crisis; and (3) to permit an insurgent finishing second in the 1977 Democratic Party primary for City

Council President to defeat the incumbent in the run-off primary.

The Run-Off Statute Does Not Deny Blacks or Hispanics An Equal Opportunity to Participate In the Electoral Process

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973, as amended in 1982, provides that it is unlawful for a State or political subdivision to impose any voting practice or procedure "in a manner which results in a denial or abridgement of the right ... to vote on account of race or color...." 42 U.S.C. §1973(a). Subsection (b) of Section 2 sets forth the following detailed explanation of what constitutes a denial of the right to vote:

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have

> less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. (Emphasis added.)

The Second Circuit properly held that the New York run-off statute does not deny any class of citizens the right guaranteed by Section 2 of the Voting Rights Act, i.e., to participate equally in the political process (App. 18a-19a). Rejecting the district court's overly mechanical application of the "results test", the Second Circuit fairly appraised the actual effects of the statute, in its thirteen-year history, as well as its

possible discriminatory effects.[10] The analysis conducted by the Second Circuit, which gave due consideration to the facts of this particular case, is precisely the type of analysis which Congress deemed appropriate when it amended Section 2 of the Voting Rights Act to incorporate the "results test":

> [Amended §2] requires the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case of whether the voting strength of minority voters is ... minimized or canceled out.

1982 U.S. Code Cong. & Admin. News, at 207 (emphasis added). See also United States

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[10]Since it was undisputed that the run-off statute had not had any actual discriminatory effect, the Court considered whether petitioners could challenge the law based solely upon its "anticipated" harmful effect (App. 21a, n.5). Although it found "unsettled whether Section 2 can be violated at all in the absence of discriminatory results...," the Court concluded that petitioners could challenge §6-162 on the basis of anticipated discriminatory impact (id.) (emphasis in original).

v. Marengo County Commission, 731 F.2d 1546, 1565 & n.32 (11th Cir.), cert. denied, ___ U.S. ___, 105 S. Ct. 375 (1984); Major v. Treen, 574 F. Supp. 325, 350 (E.D. La. 1983).

The Second Circuit properly considered only those factors which it deemed relevant to the issue of whether Election Law §6-162 denies minority voters the opportunity to participate equally in the electoral process. In addition, the Court appreciated the important distinction between elections for multi-member bodies and those for single-member offices:

> A run-off requirement can exacerbate the unfair effect of at-large voting for a multi-member body, and has been invalidated in that context. See City of Rome [v. United States, 446 U.S. 156 (1980)].
>
> We cannot, however, take the concept of a class's impaired opportunity for equal representation and uncritically transfer it from the context of elections for multi-member bodies

to that of elections for single-member offices.

(App. 18a-19a.)

The Court found this distinction between elections for multi-member bodies and single-member offices to be implicit in this Court's holding in City of Port Arthur v. United States, 459 U.S. 159 (1982), where a run-off requirement appended to the City's at-large voting system for seats on the multi-member City Council was found to violate §5 of the Voting Rights Act (42 U.S.C. §1973c),[11] and yet a similar run-off requirement for the election for the City's

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[11]Section 5 of the Act requires that when a "covered" State or political subdivision seeks to change any standard, practice, or procedure with respect to voting, it must first obtain pre-clearance from the Attorney General of the United States or a declaratory judgment from the District Court for the District of Columbia that the proposed change has neither the purpose nor the effect of denying or abridging the right to vote on account of race.

Mayor was not challenged or even mentioned in the Court's opinion (App. 19a). While recognizing that there are indeed devices which may have the effect of denying minority voters an equal voice in the electoral process, the Second Circuit nevertheless determined that, in the case of the three primary elections to which §6-162 applies, the run off requirement does not deny any class such an equal voice (App. 19a).

Because the winner of the three affected elections is chosen directly by all eligible voters, and that fact is not affected by the electoral scheme imposed by §6-162, there is not and cannot be any denial of an equal opportunity to participate in the political process (App. 19a). Cf. Jones v. Lubbock, 727 F.2d 364, 386 (5th Cir. 1984) (court invalidated at-large system for electing city council members, but upheld a

plan to replace it with six single-member districts).

Rather than establishing a hard and fast rule governing elections to single-member offices, the Second Circuit specifically limited its holding to the statute in question and to the particular context in which it operates:

> [S]o long as the winner of an election for a single-member office is chosen directly by the votes of all eligible voters, it is unlikely that electoral arrangements for such an election can deny a class an equal opportunity for representation. We need not determine whether such opportunity could ever be denied in the context of an election to a single-member office. It suffices to rule in this case that a run-off election requirement in such an election does not deny any class an opportunity for equal representation and therefore cannot violate the Act.

(App. 19a) (emphasis added).

Despite the obvious logic in the approach adopted by the Second Circuit in addressing the Voting Rights Act claim,

petitioners maintain that the Court should have engaged in the same type of "totality of the circumstances" analysis performed by the district court.[12] See Petition, p. 31. However, the "totality of the circumstances" test adopted by Congress when it amended Section 2 of the Voting Rights Act in 1982 does not require a court to treat the "typical factors" set forth by Congress as mere items on a checklist which must affirmatively be established in order to reach a determination whether a particular statute or practice has a discriminatory effect. Rather, a court in a

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[12]In amending Section 2 of the Voting Rights Act, Congress suggested nine "typical factors" which a court might consider in determining whether, "based on the totality of the circumstances", the political process is not equally open to participation by the minorities. See 1982 U.S. Code Cong. & Admin. News, at 206-07. The district court was persuaded that petitioners had met their burden of proof on six of the nine "typical objective factors" listed in the Senate Report (App. 112a-132a).

voting rights case is required to conduct an analysis of those factors that are relevant to the issues in the particular case. The court clearly is not limited to a consideration of the nine "typical factors" suggested by Congress, nor is it bound to consider each:

> The courts ordinarily have not used these factors, nor does the Committee intend them to be used, as a mechanical "point counting" device...

1982 U.S. Code Cong. & Admin. News, at 207.

Notwithstanding its determination that it was inappropriate for the district court to consider only those "typical factors" set forth in the Senate Report which accompanied the 1982 amendments to the Voting Rights Act, the Second Circuit reviewed the district court's factual findings as to five of those factors (App. 22a-24a). Although it found that there was no need to reach a determination as to whether those

factual findings were "clearly erroneous", the Court stated its view that some of the district court's findings were "highly questionable" (App. 22a).

Thus, even if it were necessary to review the factual findings reached by the district court with respect to those "typical factors" which it considered relevant, this Court would find them to be "clearly erroneous." For example, the district court's finding that the state policy underlying the run-off statute is "tenuous" was based solely upon its conclusion that the statute was designed and enacted with a discriminatory purpose (App. 129-130a). This determination was without any factual basis. As noted above (see p. 11-12, supra), the run-off bill was supported by State Senator Robert Garcia, who stated in the legislative debate that Herman Badillo also supported the law, and all five black and Hispanic Assemblymen

from New York City voted in favor of the run-off bill (App. 8a). Since the district court's finding as to the purpose of the run-off law has been held to be clearly erroneous (and petitioners do not challenge that holding), the finding of a tenuous state policy must also fall (App. 24a).

Likewise, the district court's factual finding that political campaigns in New York City have been characterized by racial appeals was clearly erroneous, since it was based on evidence concerning only a single instance of such appeals, i.e., the use of "racially slanted campaign tactics" in the 1973 run-off primary (App. 117a-119a). The district court improperly failed to consider the absence of racial appeals in any other elections in which minorities were candidates (App. 22a-23a), as it was required to do. See Latino Political Action Committee v. City of Boston, 609 F. Supp. 739, 744-45 (D.

Mass. 1985); Black Voters v. McDonough, 421 F.Supp. 165, 190 (D. Mass. 1976), aff'd, 565 F.2d 1 (1st Cir. 1977).

Although the district court recognized that minorities have enjoyed considerable success in gaining election to public office in New York City, it dismissed this evidence based solely on the fact that none of the elections involved offices to which the run-off statute applies (App. 129a). This refusal by the district court to consider elections other than those to which the challenged practice or statute applies, in examining this factor under Section 2, was clearly improper. See, e.g., United States v. Marengo County Comm., supra, 731 F.2d at 1572; NAACP v. Gadsden County Sch. Bd., 691 F.2d 978, 983 (11th Cir. 1982).

As demonstrated above, the Court of Appeals correctly concluded that New York Election Law §6-162, which was enacted in

1972 with overwhelming support in the State Legislature, including that of almost all black and Hispanic legislators, and which was designed to prevent election results such as those which had occurred in the 1969 mayoral election in New York City, and which has not had any negative effect on a minority candidate in its thirteen-year history--but indeed may help a minority candidate to win nomination--does not deny to minority voters an equal opportunity to participate in the political process.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

May 23, 1986.

Respectfully submitted,

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